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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FEMINISTS FOR LIFE OF AMERICA, PROFESSIONAL WOMEN'S NETWORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FEMINISTS FOR LIFE OF AMERICA, PROFESSIONAL WOMEN'S NETWORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

Feminists for Life of America ("FFLA") is an organization of pro-life feminists with national headquarters in Kansas City, Missouri, and state chapters throughout the nation. FFLA and its state chapters engage in educational activities, lobbying and advocacy designed to foster respect for human life and social and economic justice for women. FFLA intends in this *amicus* brief to address issues relevant to the first two questions presented in the Petition for Writ of Certiorari:

> 1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. Sec. 1985(3)?
>
> 2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. Sec. 1985(3)?

Feminism presupposes that a pregnant woman "is not isolated in her privacy," *Roe v. Wade,* 410 U.S. 113, 159 (1973), and that her connection to the unborn child has a profound effect upon her life, that of her child, and society at large. *See* West, *Jurisprudence and Gender,* 56 U. Chi. L. Rev. 1, 3 (1989). Thus, many feminists take issue with the implication that women are incapable of independent thought on the issue of abortion, or that "true" feminists are of only one view. Neither assumption withstands empirical validation—today, or historically. Public opinion surveys consistently show that a majority of American women are opposed to abortion in most of the circumstances in which it is currently performed. Furthermore, FFLA has marshalled compelling evidence that the leading feminists of the 19th century condemned abortion in the strongest terms, for reasons which remain relevant today. This Brief is largely devoted to presentation of this evidence.

The Professional Women's Network (PWN), founded in 1984, is a national organization representing women

in a variety of professional and business fields. The objectives of PWN are: to advocate respect for human life and the well-being of all women, regardless of race, creed, or economic status; to provide a system for women to help other women in crisis pregnancies through personal community involvement; to urge passage of pro-life legislation that protects the preborn child *and* affords meaningful (financial, legal, educational) assistance to women who choose to carry their pregnancies to term; and to promote public awareness of women's issues and relay accurate information about abortion.

The state legislators and academicians identified in the Appendix share the viewpoint of FFLA and PWN that opposition to abortion is essential to advancing the genuine interests of women in society.

SUMMARY OF THE ARGUMENT

Respondents ask this Court to determine that opposition to abortion constitutes invidiously discriminatory animus against women for purposes of 42 U.S.C. § 1985 (3). The proposition is absurd. There is no evidence that the actions of the petitioners in blocking access to abortion clinics was motivated by anything other than sincere conviction that abortion is the taking of innocent human life. Furthermore, it is clear that opposition to abortion is not a gender-specific trait. The named petitioner in this matter is a woman; hundreds of women across the nation participate in acts of civil disobedience such as those alleged to have been planned by the petitioners. Organizations of women who have had abortions, regret that decision, and work to end conditions which cause women to resort to abortion have memberships in the thousands. Public opinion polls demonstrate that there is no "gender gap" on the abortion question. Women are at least as likely as men to oppose abortion on moral and legal grounds.

The literature of the early feminist movement in the United States demonstrates that opposition to abortion at the time of the passage of the Ku Klux Klan Act was

not premised upon animus against women, but upon the firm conviction that abortion oppressed women, as well as destroyed the life of the unborn child. The early feminists defied many social conventions, but saw abortion, which they consistently referred to by terms such as "child-murder," as the result of unequal treatment of women, not a solution to that problem. They supported laws restricting abortion, as well as vigorous efforts against what they considered to be its root causes. Their activity shows that opposition to abortion can be motivated by genuine concern for the interests of women, a concern which complements respect for unborn human life.

The legislative history shows that § 1985(3) was intended to protect fundamental rights of citizenship from conspiracies which impaired the ability of the states to guarantee equal protection under the law. No such conspiracy has been shown to exist in this case. There is no evidence that Congress intended to protect rights which did not reflect its central concern for the rights of political participation of newly-enfranchised citizens. "Seeking abortion" cannot be termed an essential right of national citizenship, since it is not a right indispensable to a free society.

Current feminist thought is divided on whether abortion is essential to the emancipation of women, or, as the early feminists believed, a badge and incident of the oppression of women. By claiming that the Petitioners' alleged activity satisfies the "class animus" requirement of § 1985(3), the Respondents would have this Court decide this controversy, and do so at the behest of commercial abortion providers, and on the basis of a record that is devoid of any evidence of animus against women. Furthermore, Respondents would have this Court expand the applicability of § 1985(3) to situations far beyond the scope intended by Congress, and permitted by the previous construction of § 1985(3) by this Court.

ARGUMENT

I. OPPOSITION TO ABORTION DOES NOT CONSTITUTE INVIDIOUS DISCRIMINATORY ANIMUS AGAINST A "CLASS" PROTECTED UNDER 42 U.S.C. § 1985(3).

A. The Class of "Women Seeking Abortion" Is Not a Proper "Class of Persons" under Section 1985(3).

The court of appeals below, along with the Second Circuit, has engaged in dangerous and unwarranted expansions of the definition of "invidiously discriminatory animus," and of the "classes of persons" who may seek relief, under 42 U.S.C. § 1985(3). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted*, No. 90-985 (Feb. 25, 1991); *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). In holding that a subgroup of gender defined by a particular activity, i.e., "women seeking abortion" is a proper "class of persons" under § 1985(3), and that opposition to abortion is itself conclusive evidence of a discriminatory animus toward women, these circuits have spurned this Court's strong caution against applying § 1985(3) to any conspiracy motivated by other than racial animus in the absence of "convincing support" in the legislative history. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 837 (1983).

Proof of an "invidiously discriminatory animus" behind the conspirators' action is required to establish a violation of 42 U.S.C. § 1985(3). *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971) (note omitted); *Scott*, 463 U.S. at 837. Despite repeated emphasis on the narrowness of "class-based animus," and stern warning against using § 1985(3) as a "general tort law," *Griffin*, 403 U.S. at 88, the court of appeals has equated opposition to abortion with invidious, gender-based discrimination. Moreover, it has done so without a shred of evidence in the record that the motivation of the petitioners was anything other than a sincere belief that abortion is abhorrent and that women and other members of society alike are harmed by abortion on demand.

In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989), the court cogently explained why the sub-class of "women seeking abortions" is not a class intended to be protected by § 1985(3):

> The Court disagrees with the proposition that any "particular [sub]class of women," . . . is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender, i.e., it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the . . . [Section 1985(3) analysis.]

Id. at 1171. *See also, Mississippi Women's Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

The National Organization for Women and the respondents engaged in the business of performing abortions are entitled to their own viewpoint: that a guarantee of unfettered availability of abortion on demand without public *or private* interference is an indispensable component of equality and autonomy for women; and, that opposition to abortion is the absolute equivalent of sex discrimination. However, this Court has repeatedly held that restrictions upon abortion do not constitute evidence of discriminatory intent, nor a violation of equal protection. *See Harris v. McRae*, 448 U.S. 297, 322-23 & n. 26 (1980); *Maher v. Roe*, 432 U.S. 464, 469-71 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66-67 (1976). Any argument that women are entitled to access to abortion free from public or private interference in order to be assured equal protection of the law must fail. *See generally*, Smolin, *Why Abortion Rights Are Not Justified By Reference to Gender Equal-*

ity: A Response to Professor Tribe, 23 J. Marshall L. Rev. 621, 639 (1990). Indeed, the contrast between the jurisprudential firestorm over abortion rights and the broad consensus concerning authentic gender discrimination issues—such as women's rights to equal pay and promotion opportunities and freedom from sexual harrassment in employment, could not be more striking.

> The failure of the Supreme Court abortion decisions to persuade or to be practically implemented starkly contrasts with the success of the Court's gender discrimination decisions. The contrast is particularly notable because the Court dealt with both subjects during the same time period and because the impact of both lines of decisions upon existing state laws was revolutionary. Legislatures which steadfastly refused to endorse the abortion privacy doctrine have embraced the principles of gender equality enunciated by ~~the~~ Court and incorporated them into numerous laws.

Wardle, *Rethinking* Roe v. Wade, 1985 Bringham Young L. Rev. 231, 249-50.

B. Opposition to Abortion is At Least Equally Strong Among Women as Among Men, and Provides No Basis for a Finding of Sex Discrimination or Any Invidious Discriminatory Animus Toward Women.

One reason for the continuing controversy concerning abortion on demand is that a majority of American women do not agree with respondents' underlying assumption that equal protection under the Fourteenth Amendment requires unlimited abortion on demand. A recent poll conducted by the Gallup Organization revealed that there is no "gender gap" on abortion: indeed, women are as likely, and in some cases, more likely than men to oppose abortion.[1] For example, only 17

[1] Americans United for Life, *Abortion and Moral Beliefs, a Survey of American Opinion* (Executive Summary) (1991). Three copies of the Executive Summary and of the complete Tabular Results of this comprehensive survey of American public opinion on abortion have been lodged with the Office of the Clerk simultaneously with the filing of this Brief.

percent of women and 20 percent of men believe that an abortion is acceptable, even during the first trimester, if the pregnancy was unplanned and would interrupt a woman's career. A mere 7 percent of women and 11 percent of men believe a first trimester abortion is acceptable as a means of birth control.[2] Only 26 percent of women and 30 percent of men believe first trimester abortion is acceptable if continuing the pregnancy would require a teenager to drop out of school, and 20 percent of women and 30 percent of men approve of abortion where the birth of a child would create a financial burden. And 53 percent of women and 47 percent of men believe the unborn child's "right to be born" outweighs, at the moment of conception, the woman's "right to choose" whether she wants to have a child.[3]

Similar responses have been repeatedly obtained in recent polls. *See, e.g.*, Wirthlin Group Survey, Jan. 15-17, 1990 in *Public Opinion*, May/June 1989 at 36. The Wirthlin survey reveals that 11 percent of married women and 9 percent of unmarried women responded that it should not be permitted at all, and 44 percent of married women and 42 percent of unmarried women responded that it should only be permitted in cases of rape, incest or to save the life of the mother.[4] This demonstrates that a majority (55 percent of married women and 53 percent of unmarried women) think that most of the abortions actually performed today should not be permitted. *See also*, Smolin, *supra* at 646 "[o]pinion polls show little or no difference between how women and men view abor-

[2] This is particularly significant in light of the fact that over 43 percent of the approximately 1.6 million abortions performed in the United States in 1987 were "repeat abortions," i.e., performed on women who have received at least one prior abortion. Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Persp. 158 (1988).

[3] Executive Summary, *supra* note 1 at 20-21.

[4] The question posed was: "Should abortion be legal as it is now, or legal only in such cases as rape, incest, or to save the life of the mother, or should it not be permitted at all?"

tion rights," *citing, e.g., The Connecticut Mutual Life Report on American Values in the '80s*, 92 (1981); G. Gallup, Jr., *The Gallup Poll: Public Opinion 1986*, 49 (1987).

Opposition of American women to abortion is also reflected in the large female membership of organizations such as the National Right to Life Committee, Concerned Women for America, American Life League,[5] and such groups as *amici* FFLA and PWN. In addition, groups such as Women Exploited by Abortion and American Victims of Abortion represent women who have had abortions, and now oppose abortion because of the conviction, based on their experience, that abortion ultimately exploits women.[6]

C. There is No Evidence of Class-Based Animus in This Case.

The activity engaged in by the petitioners does not convert their gender-neutral opposition to abortion into action representative of class-based animus. Women, such as lead petitioner Jayne Bray, participate in "rescues" at abortion clinics across the nation. "All-women rescues" planned and led exclusively by women and in which

[5] Over 140,000 of the 278,000 members of American Life League, including its president, are women, while Concerned Women for America's total membership of 755,000 includes 646,000 women. One of the nation's largest prolife organizations, the National Right to Life Committee, while it does not maintain membership statistics by gender, is led by a board of directors of which 65 percent are women and a senior management staff which is 61 percent female. In addition, more than 60 percent of the delegates to the 1990 NRLC convention were women.

[6] *See, e.g.*, Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 244-245 (describing the growing recognition of the exploitative practices of the abortion industry); D. Reardon, *Aborted Women: Silent No More* (1987); A. Speckhard, *Psycho-Social Aspects of Stress Following Abortion* (1987); Levin, *Ectopic Pregnancy and Prior Induced Abortion*, 72 Am. J. of Pub. Health 253 (1982); Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion*, 69 (Hilgers, Horan, Mall, ed. 1981).

only women participated have been held in several cities, resulting in hundreds of women being arrested for their opposition to abortion. *See, e.g., Women Picket Clinic*, Phila. Inquirer, Feb. 4, 1990 at B1, col. 8 (describing rescue at Planned Parenthood facility at which 149 women were arrested).

There is nothing in the record of this case to show that any of the activities were directed against women as a class, or even against only women seeking to enter the abortion clinic. Rather, the record is clear that *all* persons—including male clinic personnel, and men accompanying women to the clinic—would be prevented from entering the clinic during the "rescue" activity.[7] The activity of the petitioners would discriminate neither in favor of, nor against, men who sought to enter the clinic, any more than it would discriminate for or against women. It is the activity of the clinic, not the gender of the people engaged in that activity, which motivates the activity of the petitioners. As the Fifth Circuit stated in *Mississippi Women's Medical Clinic*,

> [the] protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (emphasis in original) (*citing Scott*, 463 U.S. at 834-835). Thus, petitioners did not act with

[7] The respondents conceded this point before the Court of Appeals, acknowledging that the rescue blockade permits" '[n]o one . . . to enter past the rescuers. *Neither women nor men.* Doctors, nurses, patients, staff, abortion-bound women—all are prevented from entering the abortuary . . .'" *N.O.W. v. Operation Rescue*, Brief for Appellees and Cross-Appellants at 5 (emphasis supplied).

"a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis supplied), *cert. denied*, 484 U.S. 848 (1987).

As in *Mississippi Women's Clinic* and *National Abortion Federation v. Operation Rescue*, the gravamen of this dispute is not about class-based prejudices, animus, or ill will toward any protected class of persons. What separates petitioner Jayne Bray (and all of the other American women who oppose abortion on demand) from the purported § 1985(3) "class" declared by the court of appeals is not their *gender*, but their political and moral beliefs regarding *abortion*.[8] This difference neither qualifies the purported class as a plaintiff class under § 1985 (3), nor subjects Ms. Bray and her counterparts to liability under that section.

II. THE HISTORICAL RECORD OF EARLY FEMINIST OPPOSITION TO ABORTION DEMONSTRATES THAT AT THE TIME OF THE PASSAGE OF THE KU KLUX KLAN ACT, OPPOSITION TO ABORTION WAS PREMISED NOT UPON ANIMUS AGAINST WOMEN, BUT UPON THE CONVICTION THAT ABORTION CONSTITUTED THE OPPRESSION OF WOMEN AS WELL AS THE KILLING OF CHILDREN.

A. The Early Feminists, Although Critical of Prevailing Cultural Attitudes Regarding Sexuality and the Role of Women in Marriage, Were Resolutely Opposed to Abortion.

Feminism as a social movement has existed throughout most of American history, *see* P. Davis, *History of the*

[8] Just as there is no showing of specific gender-based animus among any of the petitioners in this case, there is no showing of of any animus based upon political or moral beliefs. Furthermore, there is absolutely no evidence that the *political* or *citizenship* rights of the respondents, or of any class they purport to represent, have been frustrated by the actions of the petitioners. *See* discussion *infra* at Section III.

National Women's Rights Movement (1871), and the issue of abortion has been closely tied to feminist criticism of the social oppression and disenfranchisement of women. *See* M. Derr, *"Man's Inhumanity to Woman, Makes Countless Infants Die": The Early Feminist Case Against Abortion* (1991).[9] Contrary to prevailing assumptions, however, feminists have not traditionally argued for the moral and legal acceptability of abortion. The nineteenth century founding mothers of the women's movement did not view legalized abortion as a solution to, but rather, as an abhorrent consequence of, the oppressions and disenfranchisement of women.

The testimony of these women—including Elizabeth Cady Stanton, Victoria Woodhull, and Matilda Gage—reveal a radical stance against the mistreatment of women inside and outside of marriage, a frank understanding and acceptance of female sexuality, and an uncompromising view that abortion is "ante-natal murder," "child-murder," or "ante-natal infanticide." The early feminists did not oppose abortion out of adherence to social norms.[10] As will be seen below, they were not

[9] Copies of this privately-published monograph have been lodged with the Clerk of the Court simultaneously with the filing of this Brief. Its editor, Mary Krane Derr, a graduate student at the University of Chicago, provided the research for this section of the Brief.

[10] Nor did the early feminists live at a time when abortion was unknown or not a matter of controversy. Voluminous evidence points to an increase in abortion practice during the mid-nineteenth century.

One measure of increased laxity toward abortion is the proliferation of newspaper advertisements for abortive remedies, typically phrased in euphemistic language such as "female irregularities" and "blockage of menses." *See* M. Olasky, *The Press and Abortion, 1838-1988*, 4-9, 14-19 (1988); J. Mohr, *Abortion in America*, 47-65 (1977). The pioneer of such enterprise was one Ann Lohman, a New York midwife trading under the name "Madame Restell." *Id.* at 4-5. Lohman's practice became so widespread and notorious that the term "Restellism" was commonly used to derogate the practice of abortionists. *See Restellism Ex-*

timid in challenging prevailing and fundamental notions of the marriage relationship, some of which prevail to this day.

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posed, The Revolution, 4 (22):346 (Dec. 2, 1869), discussed at page 17, *infra*.

Medical literature of the period also documented an increase in abortion. Dr. Andrew Nebinger, a Philadelphia physician, noted that "[t]he commission of this crime [abortion] is not confined to the harlot . . . [there is] a large proportion of devotees among the refined [of] the higher classes." Nebinger, *Criminal Abortion: Its Extent and Prevention*, 31 (1870) (Toner Collection, Library of Congress). He estimated, based on his own questioning of 59 colleagues, that approximately half of all miscarriages were wilfully or criminally produced. *Id.* at 10. See also J. Cowan, *The Science of New Life*, 275 (1871) ("the licentiousness of the man and bondage of the woman . . . [led to] "the monstrous crime . . . the murder of the unborn."); *Medical Intelligence*, 51 The Boston Medical and Surgical Journal 204 (1854) ("Both women and men abound, in all our large cities, who have a decided and acknowledged reputation for performing the murderous operation."); McCollom, *Criminal Abortion*, Transactions of the Vermont Medical Society for 1865 ("the crime is frequent—and applications are continually made to apothecaries as well as physicians, for drugs for this purpose—and many of the applicants appear to have no idea of the criminality of the act, or any abhorrence of such a violation of the positive laws of God and Man."); Turner, *Criminal Abortion*, Boston Medical and Surgical Journal 299 (April 21, 1870) ("In these days, when theft is called peculation, robbery of public funds financial irregularity, &c., how can we expect to recognize as murder that which is called simply "getting rid" of something, or being "helped" out of trouble?"); Stone, *Report on the Subject of Criminal Abortion*, Transactions of the Iowa State Medical Society, Vol. I, 1867 ("Yea, even *medical* men are to be found who are too lazy to work, too ignorant to think, and too heartless to feel, who, for pecuniary recompense, will poison the fountains of life, or forcibly induce labor to the certain destruction of the foetus, and not unfrequently to the destruction of the parent.")

An 1871 investigative story on abortion practice in New York City concluded that:

> The enormous amount of medical malpractice [the common euphemism for abortion] that exists and flourishes, almost unchecked, in the City of New York, is a theme for most serious consideration. Thousands of human beings are thus murdered

Early feminist opposition to abortion was deep-seated, and addressed the *causes* of abortion, not just the practice. In this way, it was distinguished from other anti-abortion efforts including those of the American Medical Association. *See* L. Gordon, *Woman's Body, Woman's Right* (1977). Feminists documented that abortion was caused by, among other things, culturally enforced ignorance about sexual and reproductive physiology, especially family planning and fetal development; cultural construction of pregnancy as a pathological condition; a sexual double standard which permitted men to be sexually and parentally irresponsible; the social valuing of "legitimacy" over children's lives and women's well-being; and lack of social and economic support for mothers, especially single ones. *See generally*, Derr, *supra*, at i-iii. Two overriding principles emerge from this early feminist literature: a condemnation of abortion as the murder of children; and the conviction that marital, social, and economic liberation of women would bolster, and not undermine, protection for the unborn.

B. The Early Feminists Considered Abortion to be the the Killing of Children.

The nineteenth-century feminists, like the petitioners here, and millions of others who engage in a variety of educational, political, and protest activities on behalf of the unborn, understood that life begins at conception, and thus, induced abortion is the killing of that young life. Dr. Alice Bunker Stockham, a pioneer in promoting women's health issues, including the need for family planning, wrote in 1887:

> When the female germ and male sperm unite, then is the inception of a new life; all that goes to make up a human being—body mind, and spirit, must be

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before they have seen the light of this world, and thousands upon thousands more of adults are irremediably robbed in constitution, health, and happiness.

St. Clair, *The Evil of the Age*, New York Times, August 23, 1871, p. 6.

> contained in embryo within this minute organism. *Life must be present from the very moment of conception.* If there was not life there could not be conception. At what other period of a human being's existence, either pre-natal or post-natal, could the union of soul and body take place? Is it not plain that the violent or forcible removal of it from the citadel of life, is its premature death, and hence the act can be denominated by no more mild term than murder, and whoever performs that act, or is accessory to it, guilty of the crime of all crimes?

A. Stockham, *Tokology*, 246 (1887). Historian Carl Degler has noted that this valuation of fetal life at all stages "was in line with a number of movements to reduce cruelty and to expand the concept of the sanctity of life . . . the elimination of the death penalty, the peace movement, the abolition of torture and whipping in connection with crimes"—all movements which feminists supported. "The prohibiting of abortion was but the most recent effort in that larger concern." C. Degler, *At Odds: Women and Family in America From the Revolution to the Present*, 247 (1980).

Victoria Woodhull and Tennessee Claflin, sisters and co-publishers of a radical suffragist weekly, condemned abortion, as well as infant mortality, in an 1874 editorial:

> Children die because they are not properly cared for. If adults received equally improper treatment as children received, they would die at the same rate; but adults, being capable of judging for themselves as to what is proper and what is improper, by choosing the former, decrease the death-rate ten times below that which obtains among the classes who depend upon others for their treatment. . . .
>
> But this fact regarding the indifference to life that exists among parents is not perhaps the worst feature of modern society. It is not only a fact that this terrible death-rate persistently continues among children, but there is still another death method not included in its horrible details, which, if possible, is

> still more revolting, and which is nontheless a slaughter of the innocents.
>
> . . . We are aware that many women attempt to excuse themselves for procuring abortions, upon the ground that it is not murder. But the fact of resort to so weak an argument only shows the more palpably that they fully realize the enormity of the crime. Is it not equally destroying the would-be future oak, to crush the sprout before it pushes its head above the sod, as it is to cut down the sapling, or cut down the tree? Is it not equally to destroy life, to crush it in its very germ, and to take it when the germ has evolved to any given point in its line of development? Let those who can see any difference regarding the time when life, once begun, is taken, console themselves that they are not murderers having been abortionists.

The Slaughter of the Innocents, Woodhull and Claflin's Weekly, June 20, 1874.

Feminist opposition to abortion was influenced by increasing awareness during the nineteenth century of the humanity of the unborn child. Feminists held that dissemination of this new knowledge would reduce the abortion rate. Dr. Frederick Hollick, in the *Matron's Manual of Midwifery* (1848), wrote that ignorance of the processes of conception, gestation, and birth "has led to untold evils, which can never be corrected till [women] become more enlightened respecting themselves." One of these evils was abortion. Hollick not only devoted a chapter of his *Matron's Manual* to a month-by-month account of fetal development, he also sought to address "the want of simple and reliable means of prevention," which "caused the horrible practice of procuring abortion." F. Hollick, *The Marriage Guide*, 333-334 (1850).

Based upon such scientific evidence, early feminists recognized that abortion was killing from the time of conception, and rejected the outdated "quickening" distinction. As Eliza Bisbee Duffy, another advocate of fam-

ily planning and sex education, wrote in *The Relations of the Sexes* (1876):

> Abortion, intentionally accomplished, is criminal in the first degree, and should be regarded as murder. Yet women have been taught to look lightly upon this offense, and to consider it perfectly justifiable up to the period of quickening. "The embryo has no life before that period," they will say in justification of the act. I have even heard a woman, who acknowledged to several successful abortions, accomplished by her own hands upon herself, say, "Why there is no harm in it, any more than in drowning a blind kitten. It is nothing better than a kitten, before it is born." I was a young girl myself when I heard this, and I accepted the statement as a true one. Nor did I dream of questioning it until, in later years, I became thoroughly acquainted with sexual physiology, and comprehended the wonderful economy of nature in the generation and development of the human germ.

Id. at 274-275. *See also* L. Gordon, *Woman's Body, Woman's Right*, 129 (1977).

In *Roe v. Wade*, this Court endorsed the argument that 19th century anti-abortion legislation was intended to protect the health of women, not to protect prenatal life. 410 U.S. 113, 151 (1973). Scholars have thoroughly rebutted this argument, citing state court decisions and other materials which establish that a chief purpose of such legislation was protection of the unborn. *See Gorby, The Right to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1, 16-17, n. 84; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1273-75 (1975). To these rebuttals should be added the voices of the founders of the women's rights movement. In criticizing abortion, they were cognizant of the grave risks, physical and emotional, which it imposed upon women. Yet, they also equivocally held abortion to be the killing of children.

C. The Early Feminist Opposition to Abortion Included Support for Legal Restrictions Upon Abortion, and Enforcement of Such Restrictions.

Although much early feminist opposition to abortion focused on prevention and elimination of the circumstances which led women to seek abortions, feminists also supported legal sanctions against the proliferating abortion trade epitomized by Madame Restell, and known commonly as "Restellism". Dr. Charlotte Denman Lozier, a professors at the New York City Medical College for Women, won acclaim in both the popular and feminist press for her unstinting opposition to abortion in the following case:

> [Dr. Lozier] was applied to last week by a man protending to be from South Carolina, Moran by name, as he also pretended, to procure an abortion on a very pretty young girl apparently about eighteen years old. The Dr. assured him that he had come to the wrong place for any such shameful, revolting, unnatural and unlawful purpose. She proferred to the young woman any assistance in her power to render, at the proper time, and cautioned and counseled her against the fearful act which she and her attendant (whom she called her cousin) proposed. The man becoming quite abusive, instead of appreciating and accepting the counsel in the spirit in which it was proferred, Dr. Lozier caused his arrest under the laws of New York for his inhuman proposition, and he was held to bail in a thousand dollars for appearance in court.

Restellism Exposed, The Revolution, 4(22):346 (Dec. 2, 1869). The Springfield (Mass.) *Republican*, a paper with strong feminist sympathies, praised Dr. Lozier's actions, and suggested that advancement of women into the medical profession would undercut its complicity in abortion.

> May we not hope that the action of Mrs. Lozier in this case is an earnest of what may be the more general practice of physicians if called upon to commit this crime, when women have got a firmer foothold and influence in the medical profession. Some

> bad women as well as bad men may possibly become doctors, who will do anything for money: but we are sure most women physicians will lend their influence and their aid to shield sex from the foulest wrong committed against it. It will be a good thing for the community when more women like Mrs. Lozier belong to the profession.

Id.

Dr. Lozier's death, at age 26, shortly following this incident prompted the following eulogy from Pauline Wright Davis, an eminent suffragist and editor of *The Revolution.*

> Her steady, persistent, unwavering integrity, and her high sense of duty were strongly marked. Her recent action, prompt and incisive, against a high-handed crime cannot be too much commended. She chose to bear reproach and bitterness, rather than a stain upon her conscience. The impression will long remain with us of her pure, womanly grace and sweetness. Her real strength did not reveal itself in the brief interview we had with her; it was not till she came out firmly to stay the prevalent sin of infanticide that we knew the women in all her greatness.
>
> Her sense of justice would not allow her to let the wrong-doer escape the penalty of the law, while at the same time she pitied and tenderly cared for the victim. We have been amazed to hear her denounced for this brave, noble act on the ground of professional privacy. It is said she had not right to expose the outrage of having one thousand dollars offered her to commit murder.
>
> The murder of the innocents goes on. Shame and crime after crime darken the history of our whole land. Hence it was fitting that a true woman should protest with all the energy of her soul against this woeful crime.

The Revolution, 5(3): 42, Jan. 20, 1870

The historical and editorial context of these reports demonstrates the depth of feminist conviction against

abortion, and willingness to use the law in opposition to it. Dr. Lozier acted at the height of the "physician's crusade" to pass new antiabortion legislation in the states, and stiffen enforcement of existing laws. Had the feminist press [11] opposed this effort, it would hardly have criticized so pointedly those who denounced Dr. Lozier for turning "Mr. Moran" over to the law. Several months before the Lozier incident, Susan B. Anthony wrote that she "deplore[d] the horrible crime of child-murder" and "earnestly" desired its suppression. The Revolution, 4(1):4 (July 8, 1869). She added that prevention, not punishment, would be needed to halt abortions, but she did not oppose the campaign for stricter abortion legislation. To the contrary, her newspaper editorialized in 1868 in favor of legislation to restrict abortiofacient drugs and remedies, on grounds that "Restellism has long found in those broths of Beelzebub, its securest hiding place." The Revolution 1(5):2 (Feb. 5, 1868).

D. Early Feminist Opposition to Abortion Was Joined to Condemnation of Male Sexual Irresponsibility and Coercion, and the Lack of Economic and Social Support for Pregnant Women Abandoned by the Fathers of Their Children.

1. The early feminists called for prevention of the circumstances giving rise to abortion. Their concern for the lives of unborn children did not preclude, but was interwoven with, a broader concern for women with crisis pregnancies, children already born, and their mothers. Susan B. Anthony expressed the holistic nature of the feminist attitude in an 1869 editorial:

> Much as I deplore the horrible crime of child-murder, earnestly as I desire its suppression, I cannot believe . . . that such a law [prohibiting abortion] would have the desired effect. It seems to me to be the only moving off the top of the noxious weed, while the root remains. We want *prevention*, not

[11] Susan B. Anthony was the proprietor of this weekly publication, and Elizabeth Cady Stanton was the editor.

> merely punishment. We must reach the root of the evil, and destroy it.
>
> To my certain knowledge this crime is not confined to those whose love of ease, amusement and fashionable life leads them to desire immunity from the cares of children: but is practiced by those whose inmost souls revolt from the dreadful deed, and in whose hearts the maternal feeling is pure and undying. What, then has driven these women to the desperation necessary to force them to commit such a deed? This question being answered, I believe, we shall have such an insight into the matter as to be able to talk more clearly of a remedy.

Anthony, *Marriage and Maternity*, The Revolution, 4(1): 4 (July 8, 1869) (emphasis in original).

Dr. Stockham demonstrated that many of the circumstances which lead to abortion today were also operative in the nineteenth century.

> What are some of the incentives to produce abortion? An unmarried woman, seduced under false representation by a man who feels no responsibility for his own offspring, suffers alone all the shame and contumely of the act, and is tempted to cause miscarriage to shield her good name.
>
> Married women who fear that maternity will interfere with their pleasures, are guilty of forcibly curtailing embryonic life. Others again, who are poor or burdened with care or grief, or have licentious or drunken husbands, shrink from adding to an already overburdened existence.

Stockham, *supra*, at 247. She continued that "even the most aggravating circumstances cannot atone for the crime" of abortion, and emphasized that "*[t]he remedy is in the prevention of pregnancy, not in producing abortion.*" *Id.* at 250.

2. The early feminists condemned social attitudes, especially sexual double standards, which contributed to an increasing incidence of abortion. General social attitudes likewise played a role in the promotion and toler-

ance of abortion. Sarah F. Norton, itinerant lecturer and author, noted that "[s]ociety has come to believe it an impertinence in children to be born at all. . . . "[T]he single fact that child murderers practice their profession without let or hindrance, and open infant butcheries unquestioned, establishing themselves with an impunity that is not allowed to the slaugherers of cattle is, of itself, sufficient to prove that society makes a demand which they alone can supply." *Tragedy, Social and Domestic*, Woodhull & Claflin's Weekly, Nov. 19, 1870.

At the root of this demand were social attitudes regarding sexual behavior, illegitimacy, and the nature of preganancy itself. The sexual "double standard"—which permitted men to behave in an irresponsible fashion, but punished the women being victimized—was universally condemned. Dr. Stockham described how the double standard led directly to abortion:

> [T]he girls who have lost their virtue under promise of marriage [] are most deserving of sympathy and commiseration, though none receive less. [E]ven those professing to be the followers of the loving Christ, often have so little leniency, so little of the Father's love in their hearts, that they hug their Christian robes to their bodies, lest they be contaminated by the polluting touch of the victim. . . . . And if she can conceal the evidence of her guilt, she may hope by honest endeavor to retrieve her good name, and thus is tempted to produce an abortion. *Two wrongs canont make a right. . .*

Stocklam, *supra* at 247-248.

Linked to the double standard was the stigma of illegetimacy. In a particularly compelling account from Woodhull and Claffin's Weekly, Laura Cuppy Smith described how she and her daughter rejected abortion when the daughter became pregnant out of wedlock: a courageous decision not to acquiesce to societal pressure.

> Friends said—well-meaning friends—"There is a way, hide this thing from sight, send her on a jour-

> ney, destroy this evidence of youthful folly, all may yet be well." I was proud; I loved a good position in society for myself, how much more for my children; my daughter in her youth and grace and beauty, how could I bear that the world should point its finger at her and utter its mocking laugh? How could I save her? Should I accept this "one way" suggested? If I wavered—and might as I wrestled in that garden of Gethsemane—God knows it was but a second. I made my resolve. I said, "This child of youth and love! This child of my child has a right to live, and *shall* live—has a right to love, and shall have that also; has a mission to its mother and shall perform it . . . . No dark secret shall dog my child's footsteps through life; she shall enter no man's home with a lie on her lips.

Smith, *How One Woman Entered the Ranks of Social Reform; Or, A Mother's Story*, Woodhull and Claflin's Weekly, March 1, 1873.

3. The early feminists believed that the liberation of women from positions of social inequality and sexual dominance would lead to increased protection for the unborn. Since the early feminists viewed abortion as a by-product of sexual domination by men, and the unequal position of women in society, it is not surprising that they saw equality between the sexes as a necessary prerequisite to the eradication of abortion, and an end to sexual double standards, as addressing the root cause of abortion, and eradicating it.

Elizabeth Cady Stanton clearly argued that the liberation of women was needed to stop the killing of children before and after birth.

> We are living to-day under a dynasty of force; the masculine element is everywhere overpowering the feminine, and crushing women and children alike beneath its feet. Let woman assert herself in all her native purity, dignity, and strength, and end this wholesale suffering and murder of helpless children. With centuries of degradation, we have so little of

> true womanhood, that the world has but the faintest glimmering of what a woman is or should be.

The Revolution 1(4): 57-58 (Jan. 29, 1968).

Sarah Norton echoed this sentiment, referring specifically to the sexual double standard that permitted men to satisfy their desires with impunity, but left women with the choice between being despised for bearing an unplanned-for child, or denying that child his or her right to live.

> Perhaps there will come a time when the man who wantonly kills a woman and her babe will be loathed and scorned as deeply as the woman is now loathed and scorned who becomes his dupe; when the sympathy of society will be with the victim rather than the victimizer; when an unmarried mother will not be despised because of her motherhood; when unchastity in men will be placed on an equality with unchastitity in women, and when the right of the unborn to be born will not be denied or interfered with . . .

Norton, *Tragedy, Social and Domestic*, Woodhull and Claflin's Weekly, Nov. 19, 1870.

Feminist criticism of the double standard, however, did not derive from, or result in, an attitude of sexual prudishness. Victoria Woodhull, who was jailed by anti-vice crusader Anthony Comstock for allegedly circulating obscene materials through the mails, outspokenly rejected Victorian sexual attitudes.

> Where there is purity in the heart, it cannot be obscene to consider the natural functions of any part of the body, whether male or female. I am aware that this is a terrible truth to tell the world, but it is a truth the world needs to be told.

V. Woodhull, "The Garden of Eden," in *The Human Body the Temple of God*, 38 (1890). Elizabeth Cady Stanton critized Walt Whitman for writing "as if the female must be forced to the creative act, apparently ignorant of the great natural fact that a healthy woman has as much passion as a man, that she needs nothing stronger than

the law of attraction to draw her to the male." *Elizabeth Cady Stanton as Revealed in Her Letters, Diary, and Reminiscenses*, Vol. II, 114 (T. Stanton and H. Blatch, ed., 1922). The feminists were rebelling against a situation in which men were entitled to satisfy their own passions, without giving in return. They objected, not to sexual expression itself, but to its degradation through male-female inequality.

4. In condemning "forced maternity," the early feminists did not support abortion, but rather, opposed the cultural and sexual mores which compelled many women to become pregnant against their will. Such early feminists as Stockham, Anthony, and Elizabeth Cady Stanton were profoundly distressed by the phenomenon of "forced maternity." Stanton, for example, in an editorial condemning abortion as "child murder" and "infanticide," stated that "[t]here must be a remedy for such a crying evil as this. But where shall it be found, at least begin, if not in the complete enfranchisement and elevation of woman? Forced maternity, not out of legal marriage but within it, must lie at the bottom of a vast proportion of such revolting outrages against the laws of nature and our common humanity." Stanton, *Child Murder*, The Revolution 1 (10): 146-47 (March 12, 1868).

"Forced maternity" did not mean restricted access to abortion. To the early feminists, a woman was a mother once she became pregnant, and the fact that the pregnancy was unwanted in no way justified the "revolting outrage" of abortion. They also believed, however, that women had the right, within marriage, to refrain from sexual intercourse when they did not consider themselves able to bear or rear a child. Abortion resulted from the *denial* of the woman's "right to herself," as Matilda Gage termed it, not from the exercise of that right. Gage, in response to the editorial of Stanton quoted above, further illustrated this point. "The crime of abortion," she wrote,

> is not one in which the guilt lies solely or chiefly with the woman. As a child brings more care, so also, it brings more joy to the mother's heart.

> Husbands do not consult with their wives upon this subject of deepest and most vital interest, do not look at the increase of family in physiological, moral, or spiritual light, but almost solely from a money standpoint. It costs. Tens of thousands of husbands and fathers throughout this land are opposed to large families. And yet so deeply implanted is the sin of self-gratification, that consequences are not considered while selfish desires control the heart.

Gage, *Is Woman Her Own?*, The Revolution 1(14): 215-16 (April 9, 1868). Gage considered abortion to be a crime both in the moral and the juridical sense.

> I hesitate not to assert that most of this crime of "child murder," "abortion," "infanticide," lies at the door of the male sex.
>
> Many a woman has laughed a silent, derisive laugh at the decisions of eminent medical and legal authorities, in cases of crimes committed against her as a woman. Never, until she sits as a juror at such trials, will or can just decisions be rendered.

Id.

III. THE HOLDING THAT ACTIVITY IN OPPOSITION TO ABORTION IS ACTIONABLE AS INVIDIOUS DISCRIMINATION UNDER SECTION 1985(3) IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THAT SECTION.

A. Section 1985(3) Requires an Intent to Deprive a Fundamental Right of Citizenship.

The Civil Rights Act of 1871 [12] was intended by Congress to foster participation in democratic society by shielding citizens from violence and intimidation. It was not intended to be used as a sword to stifle dissent and silence political opponents. Section 2 of the Act, codified as 42 U.S.C. § 1985(3), was passed as a response to widespread acts of terror, committed with impunity,[13]

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[12] 17 Stat. 13 (1871); codified at 42 U.S.C. § 1985(3).

[13] Cong. Globe, 42nd Cong., 1st Sess., 322 (Remarks of Rep. Stoughton) ("not a single offender brought to justice"); *Id.* at 368 (Rep. Sheldon); *Id.* at 428 (Rep. Beatty).

aimed at creating an environment hostile to equality in the democratic and judicial process.[14] While some members narrowly defined denial of fundamental rights of citizenship,[15] at most, § 1985(3) was designed to protect those rights safeguarding participation in a free and democratic society.[16]

Rep. Cook, who drafted § 1985(3), echoed the sentiments of the majority in asserting that Congress should protect those political rights and legal rights, such as voting and access to courts,[17] and punish acts designed to wrongfully deny those rights.[18] This was consistent

[14] Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331, 349, 368 (1967); Globe at 395 (Rep. Rainey) (the animus of the Ku Klux is to remove existing state structures, to be rebuilt by them); Globe at 441-51 (Rep. Butler) (intent of the Klan was to drive the Republican Party and such ideals out of the South); Globe at 702 (Sen. Edmunds) ("systematic plan to kill or drive out white Republicans and drive Negro Republicans from the polls").

[15] Globe at 333-34 (Rep. Hoar) ("there must be a clear case of denial of government . . . the denial to large classes of the people of the blessings of republican government altogether").

[16] Originally, it was offered to replace a measure protecting voting rights. Cong. Globe 42nd Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger); *see also, Ku Klux Klan Act*, 11 St. Louis U.L.J. at 331-32; Globe at 340 (Rep. Kelley) (protects equal political participation) Globe at 425-27 (Rep. McKee); Globe at 428 (Rep. Beatty); Globe at 436-40 (Rep. Cobb); Globe at 457 (Rep. Coburn); Globe at 483-85 (Rep. Wilson); Globe at 157-59, 165-66 (Rep. Shellabarger); Globe at App. 251-52 (Sen. Morton); Globe at 656 (Sen. Nye); Globe at 686-90 (Sen. Schurz).

[17] Such rights also include: right to advocate ideas and candidates for office; right of access to federal courts; the integrity of the state courts, safeguarding witnesses, jury members, and officers of the court; and the right to appeal. Globe at 486 (Rep. Cook). *See* also, Globe at 383 (Rep. Hawley) (voting and holding office are protected rights of citizenship).

[18] Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi. L.Rev. 402 (1979); Globe at 333-35 (Rep. Hoar) (manipulation of courts and jury, interfering with right to vote); Globe at 375 (Rep. Lowe) (driving person from the

with Rep. Bingham's idea of "equal and exact justice" under the Fourteenth Amendment, encompassing, not the right to be free of all discrimination, but instead, merely a right, common to all citizens, to judicial enforcement of fundamental rights.[19] Rep. Shellabarger, the sponsor of H.R. 320, explained that it covered only those acts aimed at denying rights that are

> essential franchises of national citizenship. . . . In this regard the bill goes nowhere beyond the protection of rights *clearly and unquestionably* fundamental, and belonging to citizenship in every free Government as an element and attribute of that national citizenship which he carries with him wherever he goes throughout the world.[20]

Agreeing that Congress should protect "those great fundamental rights on which all true freedom rests," [21] Rep. Garfield, who was most instrumental in amending § 1985(3) to its present form, insisted that such fundamental rights were limited.[22] Others concurred, intend-

state, terrorizing justice system); Globe at 459 (Rep. Coburn) (manipulating authorities to avoid arrest, indictment, and prosecution); Globe at 481 (Rep. Wilson) (intimidation of state authorities); Globe at 514 (Rep. Poland) (section covers intent to "step in and clog justice" and "interfere and prevent the execution of that State law"); Globe at 516-17 (Rep. Shellabarger); Globe at 567, 580 (Sen. Edmunds) (acts designed to "defeat the regular and due administration of justice" and to "obstruct State authorities").

[19] Maltz, *Reconstruction Without Revolution*, 24 Houston L.Rev. 221, 269 (1987).

[20] Globe at App. 69 (remarks of Rep. Shellabarger) (emphasis added); *see also*, Globe at 332 (Rep. Hoar) ("fundamental, essential rights of human nature itself"); Globe at 334 (Rep. Hoar) (rights that are "fundamental and essential to citizenship," and are "the blessings of republican government"); Globe at 382 (Rep. Shellabarger) ("rights of national citizenship"); Globe at 459 (Rep. Coburn) (fruits of the "essence" of a "republican form of government).

[21] Globe at App. 153 (remarks of Rep. Garfield).

[22] Globe at App. 152 (Rep. Garfield) (interpretations of fundamental privileges and immunities that include "protection by the

ing the measure to protect only those essential, inalienable rights of national citizenship.[23]

There is no evidence that Congress intended to protect rights which did not reflect its central concern for the rights of political participation of newly-enfranchised citizens. "Seeking abortion" cannot be termed as essential right of national citizenship, since it is not a right indispensable to a free society.[24] Senator Duke noted during floor debate on the Ku Klux Klan Act that procured abortion was itself an illegal act.[25] Thus, to conspire privately to peaceably block the doors to an abortion clinic no more deprives women of the essential rights of national citizenship to equally participate in the political or judicial process, than a sit-in at a segregated lunch counter deprives potential restaurant patrons of their citizenship rights.

B. Section 1985(3) Should Not be Used to Resolve the Political and Cultural Dispute Over Whether Opposition to Abortion Constitutes Discrimination Against Women.

The broader dispute over abortion is manifested by a division in feminist theory over whether "women can [ ]ever achieve the fulfillment of feminist goals in a society permissive toward abortion." Callahan, *Abortion & the Sexual Agenda*, Commonweal 232, 232 (April 25,

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Government, the enjoyment of life and liberty, with the right to . . . pursue and obtain happiness and safety," go far beyond the intent of the Framers); *Ku Klux Klan Act*, 11 St. Louis U.L.J. at 347.

[23] Globe at 395 (remarks of Rep. Rainey); Globe at 428 (Rep. Beatty). Nearly every Republican denied that Congress had power to punish conspiracies motivated solely to deprive the victim of his rights. *Ku Klux Klan Act*, 11 St. Louis U.L.J. at 377.

[24] *See generally*, M. Glendon, *Abortion and Divorce in Western Law* (1988).

[25] Globe at App. 91. Sen. Duke, an opponent of the act, made his comments in the course of identifying the range of criminal activity that took place in the district of one of the chief Radical Republican sponsors of the act in the House.

1986). Respondent N.O.W. holds that abortion is essential to their notion of the feminist agenda. Many others, including, in fact, a majority of American women, hold that a more encompassing and truly feminist vision of justice demands protection for the unborn child. *Id.* at 234. A contrast is sometimes drawn in feminist theory between "cultural" feminists, who emphasize the importance of women in the creation and nurturing of human life, and "radical" feminists, who identify this very role as the source of oppression of women.[26] These contrary views of feminism offer different conclusions on whether abortion is necessary for the social and political emancipation of women, and whether opposition to abortion is, *per se*, discrimination against women. Bayles, *Feminism and Abortion*, The Atlantic Monthly 83, 85 (April 1990).

Respondents would have the Court resolve this debate under the rubric of federal civil rights law, by declaring that the alleged activities of the petitioners constitute invidious class-based discrimination against women. This is the essence of the holdings of the court of appeals below, and of the Second Circuit. Neither court has offered a plausible rationale for its conclusion on the discriminatory animus issue; the only reasonable conclusion is that both courts unquestioningly embraced respondent National Organization for Women's extreme political viewpoint on the relationship between abortion and women's rights, to the exclusion of all others. A reasonably close analysis of the question establishes (1) that feminist theory is itself divided on the connection between abortion and gender discrimination; and (2) that opposition to abortion is fundamentally grounded in concern for the life of the unborn child, not animus toward women as a class. Clearly, this Court should reject the respondents' attempt to put the weight of the nation's civil rights laws behind the dubious proposition that anti-abortion senti-

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[26] *See* West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 13 (1989); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs: Journal of Women in Culture and Society 635, 636, n.4 (1983).

ment and activity is inherently discriminatory against women.

The configuration of this case further reveals that this is a dispute between opposing sides in a political, legal, and social conflict; not a genuine dispute over the ability of the Commonwealth of Virginia to ensure the equal protection of the laws to its citizens. The respondents do not include any individual woman seeking an abortion at any of the respondent clinics. Nor did the respondents, in the hearing before the District Court, present testimony from any member of the "class" purportedly at risk of deprivation of equal protection of the law from the petitioners' activity. Rather, they relied chiefly on testimony from persons employed either to perform abortions, or to advocate for legalized abortion. Furthermore, there was not a shred of evidence that respondents could not obtain adequate injunctive relief under Virginia law, or in the Virginia courts.

Simply put, the respondents here support the act of abortion, and its legalization. The petitioners oppose the *act* of abortion—not the class of women as a whole, or the sub-class of women seeking to obtain abortions. The common law of trespass, the equitable power of injunction, and the police power of criminal law are amply available to redress any alleged injury arising out of the dispute between these parties. This case has nothing to do with gender-based discrimination, invidious or otherwise, and it is a flagrant abuse of civil rights law to suggest that it does.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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